STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:		
HANNAH EISENBERG,		
Complainant,	CHARGE NO(S):	2002CA1233
	EEOC NO(S):	21BA20516
and	ALS NO(S):	04-008
STATE OF ILLINOIS DEPARTMENT OF TRANSPORTATION,		
Respondent.		

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8b-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

Entered this 23rd day of August 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
HANNAH EISENBERG,	)	
	)	
Complainant,	)	
	)	**Charge No.: 2002CA1233**
	)	**EEOC No.: 21BA20516**
and	)	**ALS No.: 04-008**
	)	
	)	
STATE OF ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	**Judge Lester G. Bovia, Jr.**
	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter has come to be heard on Respondent's Motion for Summary Decision ("Motion"). Although Complainant was properly served with the Motion and granted an extension of time to file a response, Complainant never filed a response. Accordingly, this matter is now ready for disposition.

The Illinois Department of Human Rights ("Department") is an additional statutory agency that has issued state actions in this matter. Therefore, the Department is an additional party of record.

FINDINGS OF FACT

The following facts were derived from uncontested sections of the pleadings, affidavits, and other documents submitted by the parties. The findings did not require, and were not the result of, credibility determinations. Moreover, all evidence was viewed in the light most favorable to Complainant. Facts not discussed herein were deemed immaterial.

1. Complainant is a Jewish female.

2. Respondent hired Complainant on or about August 28, 2001 as a highway maintainer. Complainant's employment status was to be probationary for six months.

3. Respondent required Complainant to attend a meeting with her supervisors on or about November 16, 2001 to discuss Complainant's work performance.

4. Respondent learned subsequently that Complainant had secretly tape-recorded the meeting.

5. Respondent believed that such conduct, if true, constituted disorderly conduct and violated various criminal laws proscribing the surreptitious recording of conversations.

6. Respondent conducted an investigation regarding Complainant's alleged recording of the meeting. Respondent supplied Complainant with copies of the witness statements and allowed Complainant to submit a written response to the allegation.

7. Respondent determined that Complainant did, in fact, secretly record the meeting. On November 30, 2001, Respondent suspended Complainant for 30 days pending a final disciplinary decision.

8. Respondent terminated Complainant on December 20, 2001.

9. On December 4, 2001 and March 29, 2002, Complainant filed charges against Respondent with the Department. On January 14, 2004, the Department filed a nine-count complaint on Complainant's behalf alleging that Respondent warned, suspended, and terminated Complainant due to her sex (female) and religion (Jewish). The complaint also alleges that Respondent warned, suspended, and terminated Complainant in retaliation for other, unrelated charges that Complainant had filed against Respondent on October 14, 1999, January 4, 2001, and January 29, 2001. Respondent denies Complainant's allegations.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act ("Act"), 775 ILCS 5/1-103(B) and 5/2-101(B).

2. Complainant has not established a *prima facie* case of sex discrimination with regard to any of the adverse job actions at issue.

3. Complainant has not established a *prima facie* case of religious discrimination with regard to any of the adverse job actions at issue.

4. Complainant's sex and religious discrimination claims also fail because Respondent has articulated legitimate, nondiscriminatory reasons for every adverse job action it took against Complainant, and Complainant has offered no evidence of pretext.

5. Complainant has established a *prima facie* case of retaliation with regard to all of the adverse job actions at issue.

6. Complainant's retaliation claims fail nonetheless because Respondent has articulated legitimate, nondiscriminatory reasons for every adverse job action it took against Complainant, and Complainant has offered no evidence of pretext.

7. There is no genuine issue of material fact regarding any of Complainant's claims, and Respondent is entitled to a recommended order in its favor as a matter of law.

DISCUSSION

I. SUMMARY DECISION STANDARD

Under section 8-106.1 of the Act, either party to a complaint may move for summary decision. 775 ILCS 5/8-106.1. A summary decision is analogous to a summary judgment in the Circuit Courts. Cano v. Village of Dolton, 250 Ill. App. 3d 130, 138, 620 N.E.2d 1200, 1206 (1st Dist. 1993).

A motion for summary decision should be granted when there is no genuine issue of material fact and the moving party is entitled to a recommended order in its favor as a matter of law. Fitzpatrick v. Human Rights Comm'n, 267 Ill. App. 3d 386, 391, 642 N.E.2d 486, 490 (4th Dist. 1994). All pleadings, affidavits, interrogatories, and admissions must be strictly construed against the movant and liberally construed in favor of the non-moving party. Kolakowski v. Voris, 76 Ill. App. 3d 453, 456-57, 395 N.E.2d 6, 9 (1st Dist. 1979). Although not required to prove her case as if at a hearing, the non-moving party must provide *some* factual basis for denying the motion. Birck v. City of Quincy, 241 Ill. App. 3d 119, 121, 608 N.E.2d 920, 922 (4th

Dist. 1993). Only facts supported by evidence, and not mere conclusions of law, should be considered. Chevrie v. Gruesen, 208 Ill. App. 3d 881, 883-84, 567 N.E.2d 629, 630-31 (2d Dist. 1991). If a respondent supplies sworn facts that, if uncontroverted, warrant judgment in its favor as a matter of law, a complainant may not rest on her pleadings to create a genuine issue of material fact. Fitzpatrick, 267 Ill. App. 3d at 392, 642 N.E.2d at 490. Where the movant's affidavits stand uncontroverted, the facts contained therein must be accepted as true and, therefore, a complainant's failure to file counter-affidavits in response is frequently fatal to her case. Rotzoll v. Overhead Door Corp., 289 Ill. App. 3d 410, 418, 681 N.E.2d 156, 161 (4th Dist. 1997). Inasmuch as summary decision is a drastic means for resolving litigation, the movant's right to a summary decision must be free from doubt. Purtill v. Hess, 111 Ill.2d 229, 240 (1986).

II. COMPLAINANT HAS NOT ESTABLISHED A *PRIMA FACIE* CASE OF SEX OR RELIGIOUS DISCRIMINATION

A. Standard for Proving Discrimination Under the Act

In Counts I, IV, and VII of her complaint, Complainant alleges that Respondent warned her, suspended her for 30 days pending a final disciplinary decision, and terminated her due to her sex. In Counts II, V, and VIII, Complainant alleges that the same actions also constituted religious discrimination.

There are two methods for proving employment discrimination, direct and indirect. Sola v. Human Rights Comm'n, 316 Ill. App. 3d 528, 536, 736 N.E.2d 1150, 1157 (1st Dist. 2000). Because there is no direct evidence of employment discrimination in this case (*e.g.*, a statement by Respondent that it disciplined Complainant because of her sex or religion), the indirect analysis is appropriate here.

The analysis for proving a charge of employment discrimination through indirect means was described in the U.S. Supreme Court case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and is well established. First, Complainant must make a *prima facie* showing of discrimination by Respondent. Texas Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254-55

(1981). If she does, then Respondent must articulate a legitimate, nondiscriminatory reason for its actions. Id. If Respondent does so, then Complainant must prove by a preponderance of evidence that Respondent's articulated reason is merely a pretext for unlawful discrimination. Id. This analysis has been adopted by the Commission and approved by the Illinois Supreme Court. See Zaderaka v. Human Rights Comm'n, 131 Ill.2d 172, 178-79 (1989).

To establish a *prima facie* case of sex discrimination, Complainant must prove: 1) she is in a protected class; 2) she was meeting Respondent's legitimate performance expectations; 3) Respondent took an adverse action against her; and 4) similarly situated employees outside Complainant's protected class were treated more favorably. McQueary and Wal-Mart Stores, Inc., IHRC, ALS No. 9416, November 20, 1998.

The Commission has recognized two types of religious discrimination under the Act: 1) disparate treatment (*i.e.*, the respondent treated the complainant differently because of her religious beliefs); and 2) failure to accommodate (*i.e.*, the respondent failed reasonably to accommodate the complainant's religious beliefs). Barker and Ill. Dep't of Corr., IHRC, ALS No. S-11798, September 26, 2005. Because Complainant asserts that Respondent treated non-Jewish employees more favorably, the disparate treatment analysis is appropriate. To prove religious discrimination based on disparate treatment, Complainant must prove the same elements as the sex discrimination elements listed above. See Peyton v. Department of Human Rights, 298 Ill.App.3d 1100, 1108-09, 700 N.E.2d 451, 456-57 (4th Dist. 1998). As discussed below, Complainant has not established a *prima facie* case of sex or religious discrimination in connection with any of Respondent's alleged disciplinary actions.

B. Counts I and II – Sex and Religious Discrimination Relating to the November 16, 2001 Meeting

Respondent agrees that Complainant, as a Jewish female, is protected from unlawful discrimination under the Act. The parties do not agree on any other elements of Complainant's *prima facie* sex and religious discrimination claims in Counts I and II.

Respondent instructed Complainant to attend a November 16, 2001 meeting with her supervisors to discuss her work performance. (Complaint at 2-5.) The parties seem to agree that Complainant suffered no pecuniary or other harm as a result of the meeting. Nevertheless, Complainant characterizes the meeting as disciplinary in nature and intended to warn her about alleged shortcomings. (Complaint at 2-3.) Respondent, however, characterizes the meeting merely as a nondisciplinary counseling session aimed at helping Complainant improve her unsatisfactory work performance, misuse of sick time, and confrontational attitude. (Complaint at 2-5.) Because all facts must be construed in Complainant's favor for the purposes of this Motion, the November 16, 2001 meeting will be considered a disciplinary warning. The first issue, then, is whether a disciplinary warning, without more, qualifies as an adverse job action.

The Commission has long held that disciplinary warnings, without more, are not pervasive or severe enough to constitute adverse job actions. See, e.g., Dawkins and Ill. Cmty. Coll. Bd., IHRC, ALS No. S-11754, August 2, 2004 (holding verbal warning was not of sufficient severity to constitute an adverse action, otherwise employers face prospect of being hauled to court every time they suggest ways for employees to improve their performance or admonish employees when they err); Gallego and Roadway Express, Inc., IHRC, ALS No. 10101, November 2, 1999 (holding written reprimands were not adverse actions because they did not result in materially adverse consequences); Daugherty and DeWitt Co. Sheriff's Dep't, IHRC, ALS No. S-9371, October 13, 1999 (holding written warning was not adverse job action because it was notice of possible future discipline and not discipline *per se*). In light of Commission precedent, Complainant's November 16, 2001 meeting with her supervisors, without more, does not qualify as an adverse job action as a matter of law.

With regard to element two, Respondent obviously believes that Complainant's work performance did not meet its legitimate expectations, which was one of Respondent's reasons for requiring Complainant to attend the November 16, 2001 meeting in the first place.

Complainant has offered no evidence on this issue because she never responded to Respondent's Motion. Thus, Complainant has not satisfied element two.

With regard to element four, Respondent disputes that it treated similarly situated male and/or non-Jewish employees more favorably. (K. Smith's affidavit at 1-2.) Respondent argues that the allegedly similarly situated employee mentioned in the complaint, James Hansbrough, is not comparable to Complainant because, unlike Complainant, Mr. Hansbrough was not on probation at the time of his alleged misconduct. (Id.) Again, Complainant has offered no evidence to the contrary. Thus, Complainant cannot satisfy element four.

In sum, Complainant has not established a *prima facie* case of sex or religious discrimination relating to the November 16, 2001 meeting. However, even if Complainant had proved *prima facie* cases of sex and/or religious discrimination, her claims would still fail upon Respondent's articulation of a legitimate, nondiscriminatory reason for requiring Complainant to attend the November 16, 2001 meeting: her unsatisfactory work performance, misuse of sick time, and confrontational attitude. Again, because Complainant has not responded to the Motion, Complainant has not offered any evidence that Respondent's seemingly legitimate reason is a pretext for unlawful discrimination. Therefore, Counts I and II must be dismissed as a matter of law.

C. Counts IV, V, VII, and VIII – Sex and Religious Discrimination Relating to the 30-Day Suspension and Termination

Again, Respondent concedes that Complainant, as a Jewish female, is protected from unlawful discrimination. Respondent also concedes that the 30-day suspension and termination constitute adverse job actions. As with the counts relating to the November 16, 2001 meeting, Respondent contests elements two and four, and Complainant has offered no evidence in support of her position. Thus, Complainant has not established a *prima facie* case of sex or religious discrimination as a matter of law relating to the suspension or termination.

Respondent also has articulated a legitimate, nondiscriminatory reason for the suspension and termination. Respondent learned after the November 16, 2001 meeting that Complainant had secretly tape-recorded the meeting. (C. Alderman's affidavit at 1-2.) Respondent believed that such conduct, if true, constituted disorderly conduct and violated various criminal laws proscribing the surreptitious recording of conversations. (Respondent's Statement of Charges Against Complainant, C. Alderman's affidavit at Attachment B.) As a result, Respondent contacted the Illinois State Police, who investigated Complainant's alleged conduct. (C. Alderman's affidavit at 1-2.) Respondent also conducted its own investigation into Complainant's alleged conduct. (Id.) Respondent supplied Complainant with copies of the witness statements and allowed Complainant to submit a written response to the allegation. (Id. at 2.) After reviewing the evidence, Respondent determined that Complainant did, in fact, secretly record the meeting. (Id.) Thus, on November 30, 2001, Respondent suspended Complainant for 30 days pending a final disciplinary decision. (Id.) Respondent terminated Complainant on December 20, 2001. (Complaint at 8-11.) Respondent asserts that it terminated Complainant due to the seriousness of the infraction and Complainant's probationary status. (C. Alderman's affidavit at 3.)

Complainant has offered no evidence to suggest that Respondent's proffered reason for suspending and terminating her is a pretext for unlawful discrimination. Therefore, even if Complainant had established a *prima facie* case of sex or religious discrimination as to the suspension or termination, Counts IV, V, VII, and VIII would still fail.

III. COMPLAINANT HAS NOT ESTABLISHED A *PRIMA FACIE* CASE OF RETALIATION

On October 14, 1999, January 4, 2001, and January 29, 2001, Complainant filed discrimination charges against Respondent predating and unrelated to those pending in this case. According to Complainant, on August 17, 2001, Respondent's Civil Rights Officer, Nell Clay, confronted Complainant about those charges and requested that Complainant dismiss them. (Complaint at 4.) Complainant refused. (Id.) As discussed above, Respondent warned

Complainant on November 16, 2001, suspended her on November 30, 2001, and terminated her on December 20, 2001. (Complainant at 1-10.) Complainant alleges in Counts III, VI, and IX that Respondent warned, suspended, and terminated her in retaliation for the charges which she refused to dismiss.

To establish a *prima facie* case of retaliation, Complainant must show: 1) she engaged in a protected activity; 2) Respondent committed an adverse action against her; and 3) there was a causal nexus between the protected activity and the adverse action. Carter Coal Co. v. Human Rights Comm'n, 261 Ill. App. 3d 1, 7, 633 N.E.2d 202, 207 (5th Dist. 1994). Proof of causal connection can be established indirectly by showing that: 1) the protected activity was followed closely in time by an adverse action; or 2) similarly situated fellow employees who did not participate in the protected activity were not subject to the adverse action. Craig and Ill. Dep't of Employment Sec., IHRC, ALS No. S-5313, December 10, 1996. If Complainant can establish a *prima facie* case of retaliation, the burden shifts to Respondent to offer a legitimate, nondiscriminatory reason for the adverse job action. Id. After Respondent's offer of a legitimate, nondiscriminatory reason for the adverse job action, Complainant must prove that the offered reason is a pretext for unlawful retaliation. Id.

Respondent does not, and cannot, challenge Complainant's claim that the October 1999 and January 2001 charges are protected activities. Also, as discussed in connection with Complainant's sex and religious discrimination claims, the warning, suspension, and termination all qualify as adverse job actions. Respondent disputes that there was a causal nexus between those charges and the disciplinary actions given the 10-month gap between the latest charge (January 29, 2001) and the earliest purported adverse job action (the November 16, 2001 meeting).

However, Respondent ignores Complainant's alleged August 2001 refusal to dismiss her charges. Although Complainant is silent on the issue due to her failure to respond to this Motion, Complainant's refusal to dismiss her charges, when viewed in a light most favorable to

Complainant, should be interpreted as another opposition to unlawful discrimination. Thus, her refusal was a new and distinct protected activity for the purposes of the nexus analysis. See Patel and Cent. Ill. Assocs. Ltd., IHRC, ALS No. S-11473, May 21, 2008 (explaining that the Act's proscription of retaliatory conduct aims, *inter alia*, to allow citizens to oppose unlawful discrimination without consequence); see also 775 ILCS 5/6-101(A).

The three-month gap between Complainant's August 2001 refusal to dismiss her charges and the November 2001 meeting is small enough to create an inference of a causal nexus between the two. Likewise, the gaps between the August 2001 refusal and the November 2001 suspension and December 2001 termination also are small enough to create an inference of causation. As a result, Complainant successfully has established *prima facie* cases of retaliation with regard to all of the adverse job actions.

However, as discussed above, Respondent has articulated legitimate, nondiscriminatory reasons for the warning, suspension, and termination. Respondent asserts that it instructed Complainant to attend the November 16, 2001 meeting due to her unsatisfactory work performance, misuse of sick time, and confrontational attitude. Respondent asserts that it suspended and terminated Complainant because she engaged in disorderly, and potentially criminal, conduct by secretly recording the meeting. Again, due to her failure to file a response to the Motion, Complainant has offered no evidence that Respondent's reasons for disciplining her are pretextual. Thus, all of Complainant's retaliation claims fail.

RECOMMENDATION

Based on the foregoing, there is no genuine issue of material fact regarding any of Complainant's claims, and Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, it is recommended that: 1) Respondent's Motion for Summary Decision be granted; 2) the complaint and underlying charges be dismissed in their entirety with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____

LESTER G. BOVIA, JR.
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: December 10, 2009